Supreme Court, U.S.
FILED

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OFFICE OF THE CLERK

No: _____

THE UNITED STATES SUPREME COURT

JOHN A. KEY, JR.,

Plaintiff-Appellant,

v.

WILLIAM J. HENDERSON,
POSTMASTER GENERAL
UNITED STATES POSTAL SERVICE,

Defendant-Appellee

ON PETITION FOR WRIT OF CERTIORARI

TO THE UNITED STATES COURT OF

APPEALS FOR THE FOURTH CIRCUIT

JOHN A. KEY, JR.
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QUESTIONS PRESENTED FOR REVIEW

I. HAS A COURT OF APPEALS ENTERED A DECISION IN CONFLICT WITH ANOTHER COURT OF APPEALS ON THE SAME IMPORTANT MATTER?

II. HAS A UNITED STATES COURT OF APPEALS DECIDED AN IMPORTANT FEDERAL QUESTION IN A WAY THAT CONFLICTS WITH RELEVANT DECISIONS OF THIS COURT?

III. DID THE NORTH CAROLINA MIDDLE DISTRICT COURT ERR IN ANY OF THE FOLLOWING DETERMINATIONS:

(1) THAT PLAINTIFF HAD NOT PROPERLY INVOKED 28 U. C. C. SECTION 1339, AND/OR 39 U. S. C. SECTION 409(a)?

(2) THAT THE POSTAL REORGANIZATION ACT PREEMPTS JURISDICTION OVER CLAIMS WHICH FALL WITHIN THE COLLECTIVE BARGAINING AGREEMENT?

(3) THAT THE EMPLOYEE SUGGESTION PROGRAM FALLS WITHIN THE COLLECTIVE BARGAINING AGREEMENT?

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CITATIONS OF OFFICIAL REPORTS

The citations of the official reports of the opinions and orders entered in the case are as follows:

1. John A. Key, Jr. v. William J. Henderson, Postmaster General United States Postal Service, Civil No. 1:98CV00704, in the United States district court for the middle district of North Carolina.

2. John A. Key, Jr. v. William J. Henderson, Postmaster General, United States Postal Service, Record No. 99-2545, in the United States court of appeals for the fourth circuit.

STATEMENT OF THE BASIS FOR FEDERAL JURISDICTION

The judgment or order sought to be reviewed was entered on Aug. 1, 2000. The order and judgment of the middle district of North Carolina federal court was affirmed by a per curiam opinion.

An order was entered denying Appellant's motion for an extension of time within which to file Appellant's petition for rehearing in the fourth circuit court of appeals, pursuant to rule 40 of the rules of appellate procedure, and local rules 40, 40(a), 40(b) and 40(c), on or about Sept. 16, 2000.

The statutory provisions believed to confer on the United States Supreme Court jurisdiction to review on a writ of certiorari the judgment or order in question, include, but not by way of limitation, the following: 28 U. S. C. section 2101; Supreme Court Rules, Part III. Jurisdiction on writ of certiorari, rules 10 through 40; rule 21 of the rules of appellate procedure; rule 40(d) of the local rules of the fourth circuit court of appeals.

CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, ORDINANCES, & REGULATIONS

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CONCISE STATEMENT OF THE CASE

Facts material to a consideration of the case are as follows: Defendant-Appellee's Suggestion Program is administered by the United State Postal Service, under well defined rules and regulations set forth in its Employee Relations Manual. Plaintiff-Appellant has been an Employee for nineteen (19) years, and has submitted some fifty (50) suggestions, receiving positive results, such as cash awards and a letter of recognition, and warnings and threats, on the negative side. He became familiar with the procedures involved.

During the period of September and October 1996, Plaintiff had the idea to advertise and promote "first day cancellation" stamps by having window clerks wear neckties depicting the subject of each of these postage stamps. He first availed himself of an opportunity to discuss the idea with Enola Mixon, Postmaster of Greensboro. Ms. Mixon liked the idea and told him to submit it to the Employee Suggestion Program (ESP). From the date of submission, Dec. 8, 1996, his suggestion number 0285250 was in the possession of his Regional Facility Management in Greensboro, NC, and finally, on April 10, 1997, was turned down by Larry Bellow, Retail Specialist, apparently never being referred

up to a Postal Service vice president, as is the Postal Service's own rule for ideas with nationwide possibilities. The examining Official of Key's proposal failed to perceive his ideas met the criteria for acceptable suggestions set out in the Employee & Labor Relations Manual (ELM) 632.1, and wrongfully and mistakenly classified the proposal as unacceptable, pursuant to ELM 632.2, even though it did match the criteria set forth therein (Appendix 18). The suggestion was submitted in December 1996, and Key received a rejection letter dated April 10, 1997 (Appendix 19), even though a marketing plan combining this idea with his earlier suggestion number 160854 soon began and is making more money for the Postal Service than any other known sales endeavor not directly involved with the usual postal services. Entitled "Millions and Millions for Postal Trash," that earlier suggestion (now past statute of limitations, having been submitted Feb. 23, 1993) is significant for the specific information in its written rejection, despite later implementation, and for its efforts to discourage the initiative of the Employee, the Appellant. The rejecting Official wrote, "The U. S. Postal Service no longer produces what we refer to as license products, such as mugs, T-shirts, mats, pins, etc." (Appendix 20.) Therefore, Plaintiff-Appellant

excluded in the currently disputed idea, any suggestion that the Postal Service should make the said promotional neckties, because he had been warned against that idea by the above quoted rejection.

Just two (2) months after the Postal Service declined Key's lucrative concept, it started trying to benefit from it any way. In June 1997, Looney Tunes neckties, pins, earrings, and similar items were put on sale by the U. S. Postal Service. The Postal Service not only sold, but also manufactured said articles, or contracted their manufacture, despite the three written reasons that were presented to Key for declining his plan for boosting profits. As to the Postal Service's inclusion of "license products," Key had also earlier supplied that idea, which was formally rejected, but implemented nevertheless with great success, to the disrespect of Plaintiff-Appellant, and total neglect of any benefit to him, the valuable concept's documented originator. When the Postal Service began using Key's idea, without any credit, recognition or monetary compensation to him, it was promoted widely in the "USA" philatelic magazine. An article from the May/June 1997 issue of Postal Life," states on page 13:

"It's estimated that the Postal Service will earn $58,000,000.00 in stamps reten-

tion and philatelic products on the Bugs Bunny Stamp. Assuming the Looney Tunes series goes forward, the stamp and merchandising could net the United States Postal Service hundreds of millions of dollars in new revenue!

Yet, the concept's formal rejection states "The revenues generated from this proposal would not be sufficient to cover costs when compared to less costly forms of advertising." The other two stated reasons for decline involved comparatively trivial concerns with employee "dress code." Appellee appears willing to reap the benefits of Plaintiff-Appellant's documented profitability plan to realize the market potential for first stamp and license product sales, but unwilling to follow its own rules for the Employee Suggestion Program, as set out in the ELM, section 630 (Appendix 20). Plaintiff-Appellant had attempted to comply with Section 631.2: To improve communications between employees and management, creating a spirit of teamwork. In rejecting both above mentioned suggestions, Kelvin Mack and Larry Bellow totally ignored ELM section 631.2 on the Program's goals and objectives, in their failure to perceive Mr. Key's marketing concept did meet all the criteria for acceptable suggestions set set out in ELM 632.1.

The complaint in the instant case was dismissed by the Honorable Frank W. Bullock, Jr., Chief Judge of the North Carolina middle district federal court, citing several grounds, including a finding that Plaintiff had not properly invoked 28 U.S.C. section 1339, and that neither that statute nor 39 U.S.C. section 409(a) provided a basis of jurisdiction for the controversy between a postal employee and the Postal Service. In the case of Stephen B. Licata v. United States Postal Service, 33 F.3d 259 (1994), however, the following statement appears, at page 263 of 33 F.3d: "Two Circuits, after careful consideration, have held that where there is an independent basis for district court jurisdiction (as there is for claims against the Postal Service), both the Contract Disputes Act and the Tucker Act are irrelevant. See In Re Liberty Constr., 9 F.3d 800, 801-02 (9th cir. 1993) (contract claims against the Small Business Administration "may be entertained by the district courts, regardless of the amount sought, so long as there exists a basis for jurisdiction independent of the Tucker Act"); Marine Coatings v. United States, 932 F.2d 1370, 1377 (11th cir. 1991) (although the CDA waives sovereign immunity "there is no need to apply [the CDA] if another method of bringing suit is available"); North Side Lumber Co. v. Block, 753 F.2d 1482, 1486 (9th cir.) ("Because the proviso [added by the CDA] is an integral part of

section 1346(a)(2), we conclude that it restricts only the jurisdiction that is granted in the first part of section 1346(a)(2)."), cert. denied, 474 U.S. 931, 88 L. Ed. 2d 271, 106 S. Ct. 265 (1985); see also 2 Government Contracts, supra, section 8:226, at 153 (plaintiff may choose whether to file claim against Postal Service in district court or under the CDA). (Judge Bullock's opinion mentions the split of authority between the seventh and ninth circuits, holding that section 409(a), standing alone, does not provide an "independent basis for jurisdiction, but that the third and eighth circuits have held that "absent some other statutory bar, section 409(a) grants district courts subject matter jurisdiction over actions to which the Postal Service is a party.")

In analyzing the instant case, and attempting to determine whether there is a "substantive legal framework" present, to take the controversy out of the comprehensive scheme contained in the Postal Reorganization Act ("PRA"), 39 U. S. C. sections 1001-11, language found in the case of John Ridenour v. The United States, 44 fed.cl.202 (fed.cl.1999). At page 205 of fed.cl., and continuing at page 206, the court disposes of Defendant United States Social Security Administration's argument that, pursuant to

the case of Weber v. Department of the Army, 9F.3d.97 (fed. cir. 1993), employment suggestion programs "are personnel actions." In answering Defendant's contention that the Weber court was drawing a distinction between accepted and unaccepted employee suggestions, the Ridenour court quotes from the case of United States v. Fausto, 448 U.S. at 445 and states:

"Rather, as the quoted text of the Federal Court's decision makes clear, the distinction being drawn is between awards that commend an employee for the superiority of his job performance--and hence, are directed to his merits as an employee--and awards that compensate for suggestions the employee has no obligation to put forward in the first instance. Since the former are actions that originate with management and affect the employee in his status as a worker, they necessarily hold out a potential for supervisory abuse and therefore are included in the list of personnel actions as to which a prohibited personnel practice might occur. The later, by contrast, offer no exploitive potential because they are unrelated to the employee's status--they may affect the employee's pocketbook, but not the employee's career--and consequently are not legitimately the focus of the Civil Service Reform Act, ("CSRA").

Simply put, decisions relating to awards involving employee suggestion are not "personnel actions." Accordingly, the CSRA has no application to plaintiff's right to proceed in this court."

Given the above outlined system of analysis, the Kroll v. United States Postal Service case, 58 F. 3rd 1087 (6th cir., 1995) would have had a different result, not being deemed a "personnel matter," or subject to the comprehensive, remedial scheme contained in the Postal Reorganization Act and the instant case would have a different result.

Another argument in favor of allowing the instant case to be litigated in North Carolina middle district court can be made by the analogy of the use that is made of the Employee Suggestion Program for the implementation of ideas, with the protection afforded inventors by the patent laws, musicians by the copyright laws, and industialists by the laws governing the registration of trademarks.

In Banks v. Unisys Corporation and Burroughs Corporation, United States court of appeals for the federal circuit, No. 00-10300, decided Sept. 28, 2000, Plaintiff Banks had been recruited by a headhunter, as an expert in optical engineering, for employment with Burroughs Corporation, now wholly owned by Unisys Corporation. He was asked to sign a standard form entitled "Agreement as to Patents, Inventions and other Creative Rights, and Regarding Competitive Activities," which was essentially an agreement to assign inventive rights to Unisys. Banks did not sign the agreement. During the period of his employment, but on his own initiative, and on his own time, he tested the camera he had been employed to work with, and recommended a redesign of the camera's optics, on discovering some problems with it. As a result of his efforts, the project developed an improved design that produced an acceptable image in the camera. In 1988 Unisys incorporated the optics developed by Banks into a high speed document sorter, and asked Banks to sign as co-inventor, three of the six patent applications filed as a result of the document sorter project. On promises of pay, Banks signed the applications, but was not paid, and was

later told by Unisys he would be paid nothing. The court begain by discussing the general rule that an individual owns the patent rights to the subject matter of which he is the inventor, even though it might have been conceived, or reduced to practice, in the course of his employment. Then the two exceptions to the rule were mentioned, that if an employee has signed a contract to release his patent rights, or was hired in the first place to do research on the particular problem which resulted in knowledge that could be the subject of a patent, then the property of the invention related to that effort may belong to the employer. The court noted that Banks had refused to sign the above mentioned agreement, that Unisys did not persist in efforts to have him sign the agreement, and that on the last day of employment, he refused to sign another agreement that would have resulted in his release of any patents. The summary judgment order entered by the United States district court for the eastern district of Michigan was reversed and the case was remanded for further proceedings.

ARGUMENT

To resolve the differences among courts as to the jurisdiction of a disagreement between employer and employee concerning an Employee Suggestion Program (ESP), the above mentioned analysis used in the Ridenour case is more useful than simply taking the path of least resistance, and classifying such matter as collective bargaining disputes subject to the "PRA." Wages, working conditions, and many other aspects of employment are best addressed as collective bargaining matters. The Union is available to give the employee support, and understands the job related matters. However, a suggestion made pursuant to the ESP, is an isolated and personal matter, and an employee's rights will be detrimentally affected if he or she can only seek recourse through collective bargaining. Contract principles apply, and the injured employee should have access to the federal district courts for redress. This is especially true when the Postal Service makes no pretense of responding to a suggestion positively, then fails and refuses to follow its own rules for the Employee Suggestion Program. Mr. Key's suggestion should be viewed as intellectual property, the same as patents, copyrights, and trademarks are intellectual

property. Two months following the denial of his suggestion, Defendant-Appellee used the Employee's proposal, written "off the clock" on the employee's own personal time, without benefit to him, but for its own profit.

In Ridenour v. The United States, supra, the following statement appears on the final page of the decision:

"While the Government is free to condition the terms of its acceptance of an employee suggestion on any grounds it sees fit, it may not in turn ignore the ground rules that it has adopted. These ground rules, at least, a plaintiff may seek the enforcement of."

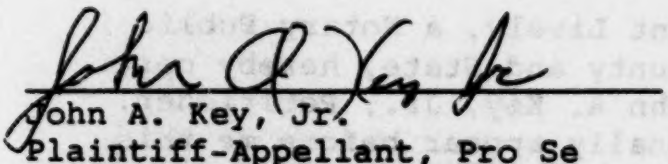
The court then quoted the following statement from Vitarelli v. Seaton, 359 U.S. 535, 546 (1959): "An executive agency must be rigorously held to the standards by which it professes to be judged."

Finally, Plaintiff-Appellant, Petitioner herein, earnestly contends that sound public policy should lead this Honorable Supreme Court to follow the reasoning of the courts of the third and eighth circuits in granting district courts subject matter jurisdiction over actions to which the Postal Service is a party, pursuant to section 409(a) of 39

U. S. C. The reasoning of the Ridenour case, although that ESP has a different statutory basis than the ESP of the Postal Service, should be persuasive. The Postal Service, probably the Nation's largest employer, should not be allowed to discriminate against its own employees in any matters involving their personal, contractual rights.

Plaintiff-Appellant requests hereby that a writ of certiorari issue, that the Supreme Court of the United States conduct such further proceedings herein as are provided for in the Supreme Court Rules and other applicable law.

Respectfully submitted,
this 1st day of January, 2001.



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THE SUPREME COURT OF THE UNITED STATES

VERIFICATION OF PETITION FOR
A WRIT OF CERTIORARI

I, the undersigned Petitioner, first being duly sworn, depose and say as follows: that I have read the foregoing Petition for A Writ of Certiorari, and the same is true of my own personal knowledge, and all parts of the Court Record and Exhibits attached hereto are accurate and complete, and accurately reflect the status of the proceedings below, this 1st day of January, 2001.

JOHN A. KEY, JR., AFFIANT,
PLAINTIFF-APPELLANT

NORTH CAROLINA - GUILFORD COUNTY

I, Kent Lively, a Notary Public of said County and State, hereby certify that John A. Key, Jr., Petitioner, did personally appear before me this 1st day of January, 2001, and executed the foregoing Verification to Petition for Writ of Certiorari, for the purposes set forth therein.

notary public
My commission expires: January 9th, 2002